IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 21ST MARCH 2007 / 30TH PHALGUNA 1928

CRL.A.No. 656 of 2001(C)

CC.56/1999 of ENQUIRY COMMR. & SPL. JUDGE, TRIVANDRUM

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APPELLANT:

G. JABAL, S/O. GANGADHARAN,
ATHAKKAVILAKATHU VEEDU,
KADAKKAVOOR (CIRCLE INSPECTOR
OF POLICE, NEYYATTINKARA).

BY ADV. SRI.T.RAVIKUMAR
SRI.S.RAJEEV

RESPONDENTS:

STATE OF KERALA REP. BY
THE DEPUTY SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI- CORRUPTION BUREAU,
SIU, THIRUVANANTHAPURAM

BY PUBLIC PROSECUTOR SRI. P. RAVEEDNRA BABU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 21/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.656 OF 2001

Dated this the 21st day of March, 2007.

JUDGMENT

The appellant, who is the sole accused in C.C.No.56/1999, faced trial for the offence punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988.

2. The prosecution case against the appellant in brief is as follows:

While the appellant was working as the Circle Inspector of Police, Neyyattinkara, Crime No.181/1998 of Vellarada Police Station has been registered against one Vijayan, brother of PW4-Latha and eight others alleging the commission of offences punishable under Sections 344, 366, 368, 378 and 506 (1) read with Section 34 of the I.P.C. The appellant took up charge of the investigation of that case on 1.10.1998. In connection with the above case, PW1 was arrested and he was in remand for some days and thereafter the appellant had gone to the house of PW4 and told her that if he has seen properly, he would help them. The said massage was passed on to PW1 by PW4 and thereby

PW1 went to the quarters of the appellant and he met him. The driver of the appellant, one Radhakrishnan, had talked to PW1 that the appellant should be given bribe and the driver also should be given a share of the same. Thereafter when PW1 contacted the appellant, he told him that PW1 should pay Rs.5,000/= for deleting two women accused from the array of the accused in Crime No.181/1998 of Vellarada Police Station, for which PW1 agreed. Further, it is alleged by the prosecution that, on the next day PW1 went to the office of the Vigilance Dy.S.P- PW8, and gave Ext.P1 First Information Statement and on the basis of the above statement, PW8 - the Dy.S.P, procured the presence of two independent witnesses namely PW2 and CW3, from the office of the Superintending Engineer and directed PW1 to bring the bribe money of Rs.3,000/= to be paid to the appellant. On the next day, that is on 10.11.1998, PW1 produced the bribe money of Rs.3,000/= (30 numbers of hundred rupee notes) before PW8 and at that time both PW2 and CW3 were also present and that amount was entrusted by PW1 to PW8 and the amount was received by PW8 on preparing a mahazar and thereafter explaining the result of phenolphthalein powder test the bribe money was returned back to PW1 by PW8. PW2, CW3 and other police officials accompanied

PW1 to the quarters of the appellant at about 4.15 p.m and PW1 alone was sent to the quarters. PW8 and the other witnesses waited near the quarters but, since the appellant was not available in the quarters on that day, PW1 could not pay the amount to the appellant. Hence, PW1, PW8 and other witnesses gone back to the office of PW8 and the bribe money was entrusted by PW1 to PW8, who kept the same in safe custody and on the next day, namely on 11.11.1998, PW1 again went to the quarters of the appellant and PW8 and other witnesses accompanied him and PW1 alone went to the quarters and he knocked the door of the quarters and the appellant opened the door and PW1 entered into the quarters and the appellant directed to place tainted currency notes on the table and immediately thereafter PW1 came out of the room and signaled to PW8 and other witnesses, who were waiting near the quarters. Suddenly PW8 - the Dy.S.P, and other witnesses entered into the quarters and enquired with appellant about the money given by PW1. Further case of the prosecution is that the appellant himself had told to PW8 that the amount given by PW1 was kept in an almirah in the bed room. Thereafter the amount was recovered and the appellant was arrested after having conducted a phenolphthalein test on the notes recovered and thereafter the

investigation was continued and a final charge has been filed against the appellant. To prove the charge against the appellant, prosecution examined Pws 1 to 8 and produced Exts.P1 to P14. On closing the prosecution evidence, the appellant was questioned under 313 of the Code of Criminal Procedure. Denying the prosecution allegations the appellant had stated that he is innocent and the case was foisted against him and no amount has been recovered from the possession of the appellant as alleged by the prosecution. The appellant, further, had stated that when PW8 - the Dy.S.P opened the door and asked about the bribe money, the appellant told him that he had not received any amount as alleged. The appellant had further stated that the amount alleged to have been recovered might have been thrown in the drawing room or into the bed room by PW1. The appellant had further stated that PW8 and the other police officials wrongfully restrained him at the bed room lying east of the drawing room and he was guarded by two Circle Inspectors and the notes alleged to have been recovered from the almirah was without his knowledge. The appellant had further stated that PW1 had not met him either on 9.11.1998 at 9 p.m at the quarters or on any other day. On 9.11.1998 he was attending the official functions from 5 p.m to 7 p.m and thereafter

was on patrol duty till 12 O' Clock in the night. To prove his case, the appellant had examined Dws 1 to 3 and relied on Exts.D1 to D2(a). However, after analysing the evidence, the trial court found the appellant guilty of the charges and he was convicted under Sections 7 and 13(2) read with Section 13(1)(d) of the P.C Act and he was sentenced to undergo R.I for four years and to pay a fine of Rs.20,000/= under Section 7 of the P.C. Act and also sentenced to undergo R.I for three years under Section 13(2) read with Section 13(1)(d) of the P.C. Act. The trial court also ordered that in default of the payment of fine, the appellant shall undergo R.I for a further period of one year more. The trial court further ordered to run the substantive sentences concurrently. The judgment of the trial court is assailed in this appeal.

3. This Court heard Sri. T. Ravikumar, the learned counsel appearing for the appellant and the learned Public Prosecutor. The learned counsel Sri.T.Ravikumar had taken the following contentions:

Firstly it is contended that the trial court committed serious error in placing reliance on the evidence of Pws 1 to 4 and 8 as the evidence of these witnesses is sufficient to prove the case against

the appellant beyond reasonable doubt. Secondly, it is contended that the trial court had committed serious error in believing PW1 with regard to the alleged demand made by the appellant without having any independent corroboration as the evidence of PW4 contradicts the material particulars of the alleged demand made by the appellant. The evidence of PW1 would not show that there was any demand made by the appellant either through the driver Sri.Radhkrishnan or through anybody else especially the prosecution had no case before the court against Sri.Radhkrishnan, the driver of the appellant regarding any demand made for and on behalf of the appellant or for himself. Thirdly, it is contended that the evidence of Pws 2 and 8, the trap witnesses, should not have been accepted by the trial court without corroboration of the independent witnesses as these witnesses are interested to find that the appellant be convicted. Fourthly, it is contended that the evidence of Pws 1 to 4 should not have been accepted as against these witnesses a crime has already been registered alleging the commission of serious offences including rape, kidnapping and criminal intimidation and as these witnesses are interested to speak against the appellant.

4. The question to be decided in this appeal in the light of the contentions raised by Sr.T.Ravikumar is that whether the findings entered and the conclusions arrived at by the trial court are sustainable in law or not.

5. The prosecution case against the appellant is that the appellant took charge of the investigation of Crime No.181/1998 of Vellarada Poalice Station and in connection with the investigation of the above crime, being the Circle Inspector of Police, Neyyattinkara, the appellant had started his investigation. PW1 and some other accused in the crime were arrested and remanded to judicial custody. As part of the investigation of the above crime, the appellant and DW3- a Police Constable of the Neyyattinkara Police Station went to the house of Pw1 on 2.10.1998 and mahazar of his wife - PW4 has been prepared by the said police constable and during that time, the appellant told to PW4 that if the appellant was seen properly, he would delete two women accused from the array of the accused in Crime No.181/1998 and this demand of the appellant was conveyed to PW1 and thereafter PW1 met the appellant at the quarters on 9.11.1998 and at that time the appellant demanded Rs.5,000/= as bribe for the deletion of two

women accused from the array of Crime No.181/1998 of Vellarada Police Station. Though PW1 had agreed to pay the amount demanded by the appellant, he was not willing to pay the bribe to the appellant. On the next day namely on 10.11.1998 PW1 went to the office of PW8- the Vigilance Dy.S.P, Trivandrum and filed Ext.P1 complaint and he also brought an amount of Rs.3,000/= before the Dy.S.P and thereafter PW8 procured the presence of PW2 and CW3, the two officers from the Superintending Engineer and after having prepared the mahazar and marking the currency notes brought by PW1 directed PW1 to hand over the amount to the appellant, if he asks for bribe. On the direction of PW8, PW1 went to the quarters of the appellant on 10.11.1998 itself accompanied by Pws 8,PW2, CW3 and other police. But as the appellant was not available, PW1 could not give the bribe amount to the appellant. PW1 and the police party went back to the office of PW8 and marked notes were entrusted back to PW8 and kept the same in safe custody. On the next day namely on 11.11.1998, PW8 again directed PW1 to go the quarters of the appellant and to give the amount to the appellant. So directing, PW1, PW8, PW2, CW3 and other police officials waited outside the quarters and as agreed early on giving the marked notes to the appellant, PW1 signaled to PW8 and other

officials and immediately PW8, two Circle Inspectors, PW2 and other witnesses entered into the quarters and PW8 asked the appellant where he kept the amount which he received from PW1. It is the further case of the prosecution that the appellant himself had stated that PW1 placed the tainted notes on the table from which the appellant took and kept the same in the almirah inside the bed room. As the appellant himself pointed out the almirah, PW8 directed PW2 to take out the currency notes from the almirah and thereafter PW2 took out the marked currency notes which was kept in the second birth of the left side of the almirah and thereafter prepared Ext.P3 mahazar, marked currency notes were recovered and in the presence of PW2 and CW3 a phenolphthalein powder test was conducted on the currency notes and the hands of the appellant. The result of the test was found affirmative and thereafter the appellant was arrested and a crime was registered against the appellant under Section 7 and 13(2) read with Section 13(1)(d) of the P.C.Act. To prove this case, prosecution placed reliance on the evidence of PW1, who is one of the accused in Crime No.181/1998 of Vellarada Police Station. This witness has stated before the court that he was an accused in Crime No.181/1998 and the appellant went to the house of PW4, who is the sister of Vijayan

- the main accused in Crime No.181/1998 and the appellant told PW4 that if the appellant was met properly, he would help them to deletie two women accused from the party array of Crime No.181/1998 and this information was passed on to PW3 by PW4 and PW3 had again informed about this to PW1. He went to the quarters of the appellant and met Sri.Radhakrishnan, the official jeep driver of the appellant. This witness has further stated that the said Radhakrishnan had told him that if the appellant had paid an amount of Rs.5,000/= and Rs.3,000/= for the staff of the appellant and said Radhakrishnan, the appellant would help them in the case. On receiving this information or rather getting the demand made by the said Radhakrishnan, this witness met the appellant on 9.11.1998 at 9 p.m. As this witness was not interested in to pay the bribe to the appellant, he had reported the matter to the office of PW8 - the Dy.S.P of Vigilance on the next day and he filed Ext.P1 complaint before PW8. When he went to the office of PW8, this witness had also brought an amount of Rs.3,000/= and PW8 had procured the presence of two witnesses from the Superintending Engineer namely PW2 and CW3. This witness has further stated that as directed by PW8, he again went to the quarters of the appellant on the same day and PW8 and other

police officials had waited outside the quarters, but as the appellant was not available on that day, PW8 and other witnesses went back to the office of PW8 and the tainted currency notes were entrusted back to PW8, who kept the same in safe custody. This witness has further stated that on the next day, namely, on 11.11.1998 as directed by PW8, he again went to the quarters of the appellant and PW8 and other witnesses, who accompanied him, were waiting outside and this witness has further stated that when he went to the quarters, he switched the calling bell at that time the appellant came out of the bed room and opened the door of the sit out. This witness has further stated that the appellant asked whether he had brought the money as asked. Then he said that he brought the amount as demanded by the appellant. Further this witness has stated that as the appellant asked him to place the amount on the table, he did so and immediately thereafter he had signaled PW8 and other officials, who entered into the quarters. PW2 is the trap witness, whose presence was procured by PW8 along with CW3 and another officer from the office. This witness has further stated that PW8 had explained the purpose and the nature of phenolphthalein test in the presence of this witness. PW8 had prepared Ext.P2 mahazar and he directed

PW1, PW2, CW 3 and other officials to accompany him to the quarters of the appellant. This witness has further stated that even though PW1 and other officials went to the quarters on 10.11.1998, as the appellant was not available, they returned back to the office of PW8 and the currency notes brought by PW1 were entrusted to PW8. This witness has further stated that on the next day he also accompanied PW1 along with PW8 and other police officials and went to the quarters and as agreed early, on payment of the amount to the appellant, PW1 signaled to the Dy.S.P and other witnesses. Immediately PW8, CW3 and other officials entered into the quarters and PW8 asked the appellant where the amount which he received was kept. According to this witness, the appellant had stated that the amount was kept in the almirah inside the bed room and on the direction given by PW8, he himself took the bundle of currency notes from the 2nd berth of the almirah inside the bed room and in the presence of him, PW8 had framed Ext.P3 mahazar and found that the currency notes recovered from the almirah, which was marked as MO1 series, are the same notes which were brought by PW1 at the time of preparation of Ext.P1 before the office of PW8. This witness has further stated that PW8 had conducted a phenolphthalein test on MO1 series currency notes

and on the right hand of the appellant and both the currency notes and the right hand of the appellant turned to pink. Further this witness has stated that PW8 also seized MO4 piece of Hindu daily paper , on which the notes were placed by PW1 and that MO4 was also subjected to phenolphthalein test. This witness has further stated that he had also taken another bundle of Rs.5,000/=all of fifty denominations stapled from the 2nd berth of the almirah which were marked as Ext.P6 series. PW3 is the husband of PW4, who was also an accused in Crime No.181/1998 of Vellarada Police Station. This witness has stated before the court that his wife PW4 had told him that the appellant came to his house and had given Ext.P4 notice requesting him to appear before the appellant and he has further stated that he himself had handed over Ext.P4 to the investigating officer. PW4 is the sister of the main accused Vijayan in Crime No.181/1998. This witness has stated that his brother Vijayan had married one Mini and in connection with the above marriage, there was a case against herself, Pws 1 and 3 and the said Vijayan and some others. This witness has further stated that the appellant came to the house of her on 2.10.1998 and demanded an amount of Rs.25,000/= for settling the case registered against her husband and others. Further this witness

has stated that the appellant told her that the appellant would come again if the amount so demanded is not paid. PW5 was the Dy.S.P of Neyyattinkara, the superior officer of the appellant, who took in custody of Exts.P6 and P7, the note book kept by the appellant and the C.D file of Crime No.181/1998 of Vellarada Police Station. This witness has also stated that he had seized Ext.P4 as produced by PW1. PW6 is the I.G. Of Police, who issued Ext.P10 sanction order to prosecute the appellant. PW7 is the Dy.S.P, who had conducted part of the investigation of the case and had seized certain documents in connection with the crime. PW8 is the Dy.S.P, who had recorded Ext.P1 statement from PW1 and had conducted the trap. This witness has stated before the court that PW1 came to his office on 10.11.1998 and had filed Ext.P1 complaint. This witness has further stated that as PW1 had brought the amount of Rs.3,000/= to be paid to the appellant as bribe, on recording Ext.P1, presence of PW2 and CW3 were requested through the officer and thereafter he had explained to them that they have to accompany them to the quarters of the appellant. As the appellant was not available on 10.11.1998, PW1 and the police officials came back to his office and the currency notes were kept in safe custody. On the next day PW1 was again directed to go to the

quarters of the appellant and himself, PW2, CW3 and other police officials were waited outside the quarters and receipt of the signal from PW1 that he had paid amount to the appellant, PW8 and other witnesses entered into the quarters and PW8 asked the appellant where the amount which he received from PW1 was kept. To this question the appellant had replied that PW1 placed the notes on the table and the appellant took the same and kept in the almirah inside the bed room and on pointing out the almirah by the appellant, PW2 was directed to take out the currency notes from the almirah. This witness has further stated that as directed by him, PW2 had taken MO1 series from the 2nd berth of the almirah and the currency notes were tallied with the marking made by him as entered in Ext.P2 mahazar. Further this witness has stated that another bundle of fifty rupees denomination of an amount of Rs.5,000/= was also seen kept in the same berth of the almirah and the same was also recovered as per Ext.P3 mahazar and the above notes were produced before the court and marked as MO6 series. This witness has stated that the appellant had told him that the above currency notes of Rs.5,000/= belong to the appellant. However, that bundle of notes was also taken into custody. This witness has further stated that in the presence of PW2

and other police officials, phenolphthalein test was conducted on the currency notes - MO1 series, MO4 piece of the Hindu daily paper on which PW1 alleged to have been placed the currency notes which was also subjected to phenolphthalein test. This witness has stated that the test conducted on the right hand of the appellant was shown positive result and thereafter on preparing the arrest memo, the appellant was arrested and investigation of the case was continued and PW7 filed final charge before the court. The above evidence of these witnesses has been considered by the trial court for finding the appellant guilty of the charges. The contention of Sri.T.Ravikumar , the learned counsel for the appellant is that since Pws 1,3 and 4 are the accused in Crime No.181/1998, their evidence has to be accepted only with due care and caution as witnesses have got interest to give false evidence against the appellant. Admittedly Crime No.181/1998 of Vellarada Police Station was registered on the direction issued by this Court in connection with a writ petition regarding the kidnapping, rape and criminal intimidation of one Mini by Vijayan, the brother of PW4 and other eight accused. PW1 had a specific case in Ext.P1 that the appellant came to the house of PW4 in connection with investigation of Crime No.181/1998 on 2.10.1998 and had told to

PW4 that he will help them in the case if he is met properly. It was the further case of PW1 that when the appellant went to the house of PW4, the appellant had given Ext.P4 notice informing the husband of PW4 to meet the appellant for the purpose of Crime No.181/19998 and this information passed on to PW3 and thereafter PW3 had informed the direction given by the appellant and therefore PW1 went to the quarters of the appellant and met Sri.Radhakrishnan, the jeep driver of the appellant. That is why PW1 went to the quarters of the appellant. In Ext.P1 the specific case of PW1 was that as the appellant directed PW4 that the appellant would help them if PW1 and others meet him properly and further the appellant had given his phone number to PW4. Hence PW1 went to the quarters on 4.11.1998 at about 10.30 a.m and he met Sri. Sreekuma, the driver of the appellant and at that time Sri.Sreekumar told him that Rs.5,000/= should be given to the C.I of Police - the appellant. Then PW1 told to Sreekumar that he will come with money on the next day and the said driver had not allowed him to see the appellant. So, on 9.11.1998 PW1 to the quarters of the appellant at about 9 p.m and he met the appellant and the appellant asked him whether the amount has been paid or not. This witness has stated that he would give the

money on the next day and this witness has further stated that the appellant had demanded an amount of Rs.5,000/= otherwise they will suffer consequences. Because of the demand made by the appellant, PW1 went to the office of PW8- the Dy.S.P of Police, and filed a complaint. But when this witness was examined before the court, he had stated that he met the appellant at 9 p.m but, he was not remembering the date and on that date the appellant had told him that if Rs.5,000/= is paid, two women accused would be deleted from the array of the accused. But, this witness has further stated in the chief examination that on 11.11.1998, that is on the day of the trap, when he went to the quarters and switched the calling bell, the appellant opened the door and the appellant could not identify him. But, when he told his name and stated that he is coming from Ottasekaharamangalam, then only the appellant recognized him. Further this witness has stated that he told the appellant that he brought the amount and at that time the appellant told him to place the amount on the table. PW1 placed the amount on the table placed on the next room where the appellant was seen. But the date and time mentioned by PW1 in the cross examination are different and he had stated that he was not remembering whether on the first day he met the driver

Sreekumar or not. Then he had asserted that the demand was made by the driver and that was on two days prior to 10.11.1998. He had further stated that the driver had stated to him that the appellant should be paid Rs.5,000/= and Rs.2,000/= to the office staff of the appellant and a further sum of Rs.1,000/= be paid to the driver. It is also admitted by him in the cross examination that the appellant demanded Rs.5,000/= as bribe but that was not spoken to by him while he was questioned by the investigating officer. Further, this witness has put a definite case that he met the appellant on 9.11.1998 at noon and hence this witness has no consistent case with the demand made by the appellant. That apart, he had a case before the court that on the first day he met the driver Radhakrishnan who had demanded bribe to be paid to the appellant and it has also come out in evidence the said driver Radhakrishnan was the 2nd accused in the F.I.R whose name was deleted subsequently by the investigating agency as per Ext.P14 report filed before the court and no explanation is also forthcoming for the deletion of the name of said Radhakrishnan from the array of the accused. It has also come out in evidence that the said Radhakrishnan was subsequently shown as a charge witness but he was not examined

by the prosecution. Apart from the discrepancies of demand made by the appellant as spoken to by PW1, he had no consistent case that when he actually met the appellant and on what time or what day the appellant demanded the bribe. In this context, the evidence of DW1 is relevant as he had stated that on 9.11.1998 between 5 p.m and 7 p.m the appellant had attended an official function at Neyyattinkara in which the Superintendent of Police was also a participant. This witness has further stated that the appellant was on petrol duty up to 12 O'Clock at night on 9.11.1998. This evidence creates doubt on the veracity of the evidence of PW1 regarding the demand made by the appellant on 9.11.1998. Further as per Ext.P6 note book seized by PW7, the Dy.S.P, also showed that the appellant was on petrol duty between 7 p.m and 12 night on 9.11.1998 and this particular portion was marked as Ext.P6(a). With regard to the alleged demand made by the appellant the evidence of Pws 3 and 4 also to be considered. According to PW3 on 2.10.1998, the appellant came to his house and had given Ext.P4 notice requesting him to meet the appellant in connection with Crime No.181/1998 and PW4 had handed over Ext.P4 notice to PW3. In this context, PW3 was cross examined by the defence and he had admitted that on

receipt of Ext.P4 notice, he met his lawyer and handed over Ext.P4 also. He had further admitted that he himself had produced Ext.P4 before the investigating officer which was seized by the investigating officer as per Ext.P5 mahazar dated 9.4.1999 and there was no explanation coming from PW3 where Ext.P4 was kept. Hence issuance of Ext.P4 on 2.10.1998 by the appellant itself was doubtful as alleged by the prosecution. That apart when PW4 was examined before the court, he had a definite case that the appellant came to her house along with DW1 and other police officers. This witness has stated that the appellant had told her that he should be properly met and the appellant had demanded an amount of Rs.25,000/= as bribe for settling Crime No.181/1998 and deletion of two women accused from the array of accused. But this witness has no case that the demand made by the appellant has been conveyed either to PW1 or any other witness. What PW4 had stated was that she had handed over Ext.P4 to PW3 and thereafter she was not aware of anything about Ext.P4. She had specifically stated that receipt of Ext.P4 or demand so made by the appellant was not conveyed to PW1. This witness also has admitted that the appellant tried to arrest her husband - PW3 in connection with the crime registered against him and PW4.

Hence, the evidence of Pws 1, 3 and 4 with regard to the demand made by the appellant for any bribe cannot be accepted without corroboration of other evidence. In this context, the specific case set up by PW1 in Ext.P1 was that the appellant had demanded Rs.5,000/= to be paid as bribe. This Court has already found that the 1st demand, according to PW1, was made by the driver Radhakrishnan and not by the appellant. In the above circumstances, the evidence of Pws 1, 3 and 4 regarding the alleged demand made by the appellant cannot be accepted. In this context, the judgment of the Apex Court reported in **Major E.G. Barsay v. State of Bombay** (AIR 1961 SC 1762) is relevant . In the above judgment the Apex Court held that the evidence of a trap witness should be corroborated by the independent evidence. Further an early judgment of the Apex Court reported in **Sat Paul v. Delhi Administration** (AIR 1976 SC 294) is also can be advantageously referred. In the above case, the Apex Court had taken the view that where the witness have poor moral fiber and have to their discredit a load of bad antecedents which indicates their having a possible motive to harm the accused who was an obstacle in their immoral activities, it would be hazardous to accept the testimonies of such witnesses without corroboration on

crucial points from independent sources. Admittedly Pws 1, 3 and 4 are accused in Crime No.181/1998 involving the offences like rape, kidnapping and criminal intimidation and so on. Hence, Pws 1 to 4 have got their own interest to speak against the appellant and they were in the zest of a remedy for escaping from the clutches of the crime registered against them. It has also come out in evidence that as per Ext.P7 C.D file a case was registered against Pws 1, 3 and 4 and her brother Vijayan and four others for committing heinous crime like rape, kidnapping and criminal intimidation. Hence, the evidence of these witnesses is not sufficient to prove that the appellant had made demand for any bribe as alleged by the prosecution. Hence, benefit of doubt regarding demand shall be construed in favour of the appellant.

In this contest, the learned Public Prosecutor contends that as per Ext.P3 recovery mahazar, MO1 series of marked currency notes were recovered from the almirah in the bed room of the appellant and it was proved by the evidence of PW2 and PW8 that MO1 series were the same currency notes marked and described in Ext.P2 entrustment mahazar. Hence the recovery itself is only to prove that the appellant had demanded bribe and received the same as per the presumption available to the prosecution as per

Section 20 of the P.C.Act.

6. To this argument, Sri.T.Ravikumar, the learned counsel appearing for the appellant had contended that even though PW1 had stated before the court that he had placed the marked currency notes on the table which was placed in the bed room of the appellant as asked by the appellant, MO4 piece of Hindu paper was found on the table seen in the sit out or in the next room of the bed room. Hence, it is doubtful whether the marked notes were placed by PW1 on the table as alleged by the prosecution and that apart PW1 had categorically stated before the court that he had placed the currency notes on the table seen inside the bed room close to the sit out in which the appellant came on switching the caling bell by PW1. That apart, according to PW8, when PW1 had given signal showing the acceptance of the amount by the appellant, PW2 and other police officials entered into the quarters of the appellant and PW8 asked the appellant where the amount which he received from PW1 was kept. To this question, the appellant himself has answered that he had taken the currency notes from the table and put the same in the almirah and thereupon PW2 was directed by PW8 to take out the currency

notes from the almirah and PW2 had taken out the currency notes. In this context, discription of the almirah from which MO1 series were seized was there in Ext.P3. It is stated in Ext.P3 mahazar that the almirah is inside the bed room and which had four berths and in the 2nd berth from top, MO1 series notes were seen found. Further it is stated that this almirah had shutters and that shutters were not fully closed but ''chariyirunnu''. Further, it is stated in Ext.P3 that there was another bundle notes of Rs.5,000/= of fifty denomination stapled and also seen kept on the same berth of the almirah and in the next berth of the almirah there were books and dresses. But it is not recorded in Ext.P3 that the almirah had got any lock or not. That apart, it has come out in evidence that some coins were also found on the 2nd berth of the almirah and that coins were not seized. Further as per the evidence given by PW2 and PW8, it could be seen that Mo1 series notes were subjected to phenolphthalein test, whereas Mo6 series notes- the 2nd bundle was not subjected to any phenolphthalein test. If such a test has also been conducted on MO6 series, it would have been proved that the same amount was received by the appellant as stated by PW1 as bribe for himself. That apart, PW2 has stated before the court that he himself had

took out MO1 series notes, but the hands of PW2 were not subjected to any phenolphthalein test which would also proved that he had taken out the notes from the almirah. That apart, a portion of the almirah from which the alleged notes were kept was not subjected to any phenolphthalein test. In this context, the evidence of PW1 and PW8 was also very crucial with regard to the handing over of MO1 series notes to PW1 that the trap was made. PW1 had a definite case before the court that on 11.11.1998 when they went to the quarters of the appellant MO1 currency notes were handed over by PW8 on the road near the quarters of the appellant, whereas PW8 had got a case that the notes were kept by him in the safe custody in his office and were handed over to PW1 at the office of PW8 itself. The contradiction in this aspect was that if PW8 had given the currency notes to PW1 on touching the same the hands of PW8 could also have been contact with the currency notes should also be subjected to phenolphthalein test. If the hands of PW8 were also subjected to phenolphthalein test it would guarantee that the currency notes recovered from the almirah of the appellant is in accordance with the prosecution case, whereas PW1 had a doubt regarding the bundle of notes i.e., whether the same was kept on the table seen inside the

sit out or inside the bed room. In this context, in Ext.P3 it is recorded that piece of Hindu daily paper which was seen on the table kept in the sit out was also subjected to phenolphthalein test which had shown a positive result. In this context, the case set up by the appellant in his Section 313 statement requires attention of this Court. According to the appellant, when PW8 and other police officials entered into the quarters, he was asked to sit down on the cot and the police officers including PW8 made a search inside the house and the appellant was kept in restraint by two C.I of Police so that he could not move. Further the appellant had a case that the currency notes which alleged to have been recovered from the quarters of the appellant might have been thrown out by PW1 through the window without his knowledge or consent. In this context, in Ext.P3 it is specifically recorded that the windows of the sit out as well as the bed room were opened. Hence, the case set up by the appellant that he had not received any amount from PW1 should have special attention in the light of the evidence adduced by the prosecution. With regard to this aspect, the learned trial judge had found the appellant alone was residing in the quarters and hence he is in exclusive possession of the quarters and he had no explanation for

the recovery made by the police. But, it has come out in evidence that when the appellant was arrested, an arrest memo was prepared and handed over to the brother of the appellant at the spot. There was no evidence to prove that the appellant alone was in the quarters. Hence, the conclusion arrived at by the trial court that the appellant alone was residing in the quarters is not correct. In this context, the prosecution is relying on Ext.P3 mahazar in which PW8 had recorded that when himself and other officials entered into the quarters, he asked about the currency notes which he had received from PW1. It is recorded in Ext.P3 that the appellant had stated to PW8 that the amount received by him from PW1 was kept in the almirah and he himself has pointed out the almirah from which recovery has been made. In this context, the finding of the trial court that the statement given by the appellant to PW8 can be taken as a substantive piece of evidence against the appellant and the statement led to the recovery of MO1 series. But, even as per Section 8 of the Evidence Act the conduct of any party or any agent to any party or any suit or proceedings in reference to such suit or proceedings is relevant, but explanation to that section it is clearly stated that the conduct in this section does not include the statement unless those

statement acts other than statements. In this context, the statement alleged to have been made by the appellant to PW8 cannot be accepted as a statement which led to the recovery of Mo1 series. That apart, even if such a statement is recorded by PW8 in the course of the investigation, that statement is hit by Section 162 of the Code of Criminal Procedure. Hence, the recording made by PW8 in Ext.P3 that the appellant had stated that he kept the amount inside the almirah and he had pointed out the almirah from which the recovery has been made cannot have any bearing to find that the recovery was made by the police and on the basis of the recovery it is proved that the appellant had received any amount as alleged by the prosecution. Hence, the presumption under Section 20 could not also be drawn in favour of the prosecution. In this context, the judgment of the Apex Court reported in **Suraj Mal v. The State (Delhi Administration)** [AIR 1979 SC 1408] is also to be referred. In the above case, the Apex Court had categorically held that mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when substantive evidence in the case is not reliable. In this context, another contention was raised with regard to the phenolphthalein test

conducted on the hands of the appellant. PW8 had stated before the court that when MO1 currency notes were recovered from the almirah, the notes were subjected to phenolphthalein test and thereafter left hand of the appellant was also subjected to phenolphthalein test, but the result was negative. Subsequently, the right hand of the appellant was subjected to phenolphthalein test and thereafter in MO3- is the bottle in which the lime water was kept. After the dipping of the right hand of the appellant it was turned to pink as per Ext.P3 mahazar. But when the same was produced before the trial court it was pointed out that there was no colour change in Mo3 bottle. But the trial court had accepted the explanation given by PW2 in this aspect as PW2 had stated that fading of the colour may be due to lapse of years. But this Court is not in a position to accept the explanation given by PW2 as PW2 is not an expert in this aspect. That apart, purpose of the phenolphthalein test is to show that hands of the appellant had contacted the currency notes prior to its recovery. But it is seen from the evidence now adduced before the court that MO3 had not changed any colour. Hence, recording of Ext.P3 that the right hand of the appellant turned pink is also doubtful. In the light of the above fact also the case set up by the appellant is more

probable regarding the alleged recovery made by PW8.

8. In the light of the discussions made and the reasoning adopted in the judgment, the appellant is entitled for the benefit of doubt and hence this Court is of the view that the judgment of the trial court is not sustainable in law and hence it is set aside and the appellant is not guilty of the offence as charged against him. Hence, he is acquitted. The bail bonds of the appellant stand canceled.

Before this Court parts with the judgment, it has to be noted that the prosecution had a case that MO6 series notes belong to the appellant. But this Court had already found that MO6 notes were not subjected to any phenolphthalein test, whereas the appellant had a case that MO6 series did not belong to him. Hence, the order of the trial court that MO6 series notes shall be adjusted as part of the fine is not legal. Hence, MO6 series shall be confiscated to the Government as per law.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.656 OF 2001C

JUDGMENT

21st March, 2007.